

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
T & T EXCAVATING & PAVING CORP. :
for Redetermination of a Deficiency or for :
Refund of Corporation Franchise Tax under :
Article 27 of the Tax Law for the Years 1986, :
1987 and 1988. :

In the Matter of the Petition :
of :
T & T EXCAVATING & PAVING CORP. :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period June 1, 1985 :
through August 31, 1990. :

DETERMINATION
DTA NOS. 810715
810716 and 810717

In the Matter of the Petition :
of :
T & T EXCAVATING & PAVING CORP. :
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Period June 1, 1985 :
through August 31, 1990. :

Petitioner, T & T Excavating & Paving Corp., 42 Phillips Road, Stillwater, New York 12170, filed petitions for: (a) refund of corporation franchise tax under Article 27 of the Tax Law for the years 1986, 1987 and 1988; (b) revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1985 through August 31, 1990; and (c) redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period June 1, 1985 through August 31, 1990.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices

of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on May 27, 1993 at 1:15 P.M. Petitioner appeared by its president, Terry R. Stewart. The Division of Taxation appeared by William F. Collins, Esq. (Arnold Glass, Esq., of counsel).

ISSUES

I. Whether petitioner has demonstrated that its failure or delay in paying the taxes in issue was due to reasonable cause and not due to willful neglect.

II. Whether the Division of Tax Appeals has jurisdiction to hear matters where the Division of Taxation assessed tax, penalty and interest on notices and demands in response to returns filed by petitioner without remitting the tax due set forth in said returns.

III. Whether the Division of Taxation properly denied petitioner's claim for refund of penalties allegedly paid for the tax years 1986, 1987 and 1988.

IV. Whether the Division of Tax Appeals has jurisdiction to hear the income tax matter presented in case number 810716 with regard to the penalties assessed pursuant to Tax Law § 685(a).

FINDINGS OF FACT

During the years in issue, petitioner, T & T Excavating and Paving Corp. ("T & T"), was engaged in the business of blacktopping and excavation work utilizing a small backhoe, bulldozer and two small dump trucks.

Mr. Terry R. Stewart was the president and treasurer and his spouse, Karen Stewart, was the vice president and secretary. Mrs. Stewart acted as the bookkeeper for the business, while Mr. Stewart worked in the field.

During the period in issue, June 1, 1985 through August 31, 1990, Mrs. Stewart took responsibility for preparing and filing the various tax returns required to be filed on behalf of petitioner. Mr. Stewart spent the majority of his time preparing job estimates, managing the job operations and performing hands-on work.

Sometime in or about January 1990, during Mrs. Stewart's absence, Mr. Stewart discovered that his wife had not filed any returns or remitted any tax since 1985 to either the

State or Federal taxing authorities.

Much confusion exists in the record with regard to petitioner's filing history. Upon audit, the auditor determined that corporation tax assessments for the years 1986 and 1987 had already been issued and referred to the Tax Compliance Division. Petitioner paid the assessment for 1988 on September 12, 1990. After a conciliation conference, petitioner filed a claim for refund, dated September 18, 1991, for the years 1986, 1987 and 1988. The claim did not specify a dollar amount for which the claim was made, only a statement which sought a refund for penalties paid for the years 1986, 1987 and 1988.

By letter dated March 20, 1992, the Division of Taxation ("Division") denied the claim for refund of penalties, stating, in pertinent part, as follows:

"Your request for return of penalties paid is denied as not meeting the requirements as defined in State Law as reasonable cause for abatement or return of penalty for late filing or late payment of corporation tax."

Although the Division recomputed the tax due for the year 1986 (petitioner was a calendar year taxpayer) and found additional tax due, the statute of limitations prevented additional assessment.

Following a meeting and conversations between the auditor and Mr. Stewart, and the submission of personal income tax returns (none of which had been filed), the Division issued six statements of withholding tax audit changes to petitioner, dated December 5, 1990, which set forth the following:

ADJUSTMENT TO WITHHOLDING TAX PER PERIOD

<u>PERIOD ENDING LIABILITY</u>	<u>TAX DUE PER AUDIT</u>	<u>TAX DUE PER RETURN</u>	<u>ADDITIONAL TAX DUE</u>	<u>PENALTY ASSESSED</u>	<u>INTEREST COMPUTED</u>	<u>TOTAL</u>
06/30/85	816.60	0.00	816.60	524.59	559.21	1,900.40
12/31/85	619.90	0.00	619.90	768.09	364.22	1,752.21
06/30/86	534.60	0.00	534.60	297.18	273.60	1,105.38
12/31/86	799.50	0.00	799.50	766.21	352.69	1,918.40
06/30/87	1,002.15	0.00	1,002.15	494.26	387.22	1,883.63
12/31/87	1,002.15	0.00	1,002.15	918.49	335.67	2,256.31
01/31/88	62.40	0.00	62.40	75.84	20.64	158.88

02/29/88	78.00	0.00	78.00	94.48	25.16	197.64
03/31/88	156.00	0.00	156.00	132.18	48.76	336.94
04/30/88	216.80	0.00	216.80	143.68	65.68	426.16
05/31/88	221.10	0.00	221.10	143.47	64.81	429.38
06/30/88	291.30	0.00	291.30	155.89	82.64	529.83
07/31/88	168.80	0.00	168.80	131.57	46.26	346.63
08/31/88	231.60	0.00	231.60	142.21	61.25	435.06
09/30/88	177.20	0.00	177.20	131.47	45.22	353.89
10/31/88	148.10	0.00	148.10	125.61	36.41	310.12
11/30/88	158.10	0.00	158.10	126.62	37.42	322.14
12/31/88	141.50	0.00	141.50	422.84	31.51	595.85
01/31/89	190.40	0.00	190.40	130.29	41.53	362.22
02/28/89	190.40	0.00	190.40	129.44	39.84	359.68
03/31/89	238.00	0.00	238.00	135.56	47.31	420.87
04/30/89	243.60	0.00	243.60	135.17	45.98	424.75
05/31/89	308.70	0.00	308.70	143.00	55.11	506.81
06/30/89	233.90	0.00	233.90	131.43	39.45	404.78
07/31/89	181.50	0.00	181.50	123.48	28.79	333.77
08/31/89	318.70	0.00	318.70	139.49	47.10	505.29
09/30/89	192.20	0.00	192.20	122.78	26.33	341.31
10/31/89	49.30	0.00	49.30	54.89	6.23	110.42
11/30/89	31.20	0.00	31.20	34.58	3.63	69.41
12/31/89	0.00	0.00	0.00	250.00	0.00	250.00

ADJUSTMENT TO WITHHOLDING TAX PER PERIOD

<u>PERIOD ENDING LIABILITY</u>	<u>TAX DUE PER AUDIT</u>	<u>TAX DUE PER RETURN</u>	<u>ADDITIONAL TAX DUE</u>	<u>PENALTY ASSESSED</u>	<u>INTEREST COMPUTED</u>	<u>TOTAL</u>
01/31/90	0.00	0.00	0.00	0.00	0.00	0.00
02/28/90	0.00	0.00	0.00	0.00	0.00	0.00
03/31/90	0.00	0.00	0.00	0.00	0.00	0.00
04/30/90	11.65	0.00	11.65	12.62	0.78	25.05
05/31/90	37.32	0.00	37.32	40.25	2.12	79.69
06/30/90	69.65	0.00	69.65	74.78	3.29	147.72
07/31/90	19.92	0.00	19.92	2.38	0.75	23.05
08/31/90	12.13	0.00	12.13	0.00	0.34	12.47
09/30/90	0.00	0.00	0.00	0.00	0.00	0.00
10/31/90	0.00	0.00	0.00	0.00	0.00	0.00
11/30/90	0.00	0.00	0.00	0.00	0.00	0.00
12/31/90	0.00	0.00	0.00	0.00	0.00	0.00

Petitioner consented to the tax and interest set forth on said statements but disagreed with the penalties assessed.

On January 14, 1991, the Division issued six notices of deficiency to petitioner, one for each of the years 1985, 1986, 1987, 1988, 1989 and 1990. The notices set forth the same amount of tax as the statements of audit adjustment for each month of the years in issue with updated penalty and interest figures.

Petitioner was granted a conciliation conference on the matter and the statutory notices were sustained. This appeal followed, wherein petitioner concedes the tax and interest due but seeks cancellation of the penalty assessed, citing reasonable cause for its abatement.

Also, the auditor received from petitioner delinquent sales and use tax returns for the period June 1, 1985 through August 31, 1990. These returns were submitted to the Tax Compliance Division for generation of assessments. On February 11, 1991, the Division issued 20 notices and demands for sales and use taxes due for all quarters between June 1, 1985 and August 31, 1990.

Petitioner received a conciliation conference on the sales tax matter which resulted in an Order sustaining the statutory notices. Petitioner appealed to the Division of Tax Appeals, conceding the tax and interest assessed but seeking cancellation of the penalties assessed.

SUMMARY OF PETITIONER'S POSITION

Petitioner believes that it has reasonable cause for the abatement of penalty. It contends that it had no knowledge of Mrs. Stewart's failure to prepare and file the requisite corporation tax, sales and use tax and income tax returns with proper payment. Further, as soon as the problem was discovered, petitioner made and is making every effort to file all returns and make all payments due. Petitioner also argued that significant weight should be given to the fact that the Internal Revenue Service abated penalties for petitioner.

CONCLUSIONS OF LAW

A. Although the issue of whether there is reasonable cause for the abatement of penalty arises in each of the matters herein, for clarity it is necessary to address each separately.¹

CORPORATION FRANCHISE TAX

Petitioner's claim for refund did not set forth a specific amount, only a general claim for penalty paid in the years 1986, 1987 and 1988. However, since neither the returns nor the assessments were placed in evidence, it is not possible to determine the amount from the record.

What the record does indicate is that petitioner received assessments for the years 1986 and 1987 and that those had passed to the Tax Compliance Division for collection prior to September 25, 1987. Petitioner filed its 1988 Corporation Franchise Tax Report on September 20, 1990. That report was due on March 15, 1989 (Tax Law § 211.1) since petitioner was a calendar year filer.

Tax Law § 1085(a)(1) and (2) imposes penalties for failure to file a return or for failure to pay the amount required to be shown on a return required under Article 9-A of the Tax Law on or before the prescribed date unless it is established that such failure was due to reasonable cause and not due to willful neglect. Petitioner alleges reasonable cause due to the failure of

¹Petitioner has conceded its liability for all taxes in issue and interest thereon.

Mrs. Stewart, vice president and secretary of petitioner, to prepare and file the proper returns with payment. Further, petitioner contends that its good faith efforts to make all the required filings and payments since discovering the omissions constitutes reasonable cause. Finally, petitioner alleges that the Internal Revenue Service, to which it was also indebted, had partially remitted penalties. However, no evidence of such a reduction was entered into the record.

It is determined that petitioner has not established reasonable cause with regard to the corporation franchise tax reports for 1986, 1987 and 1988. The fact that a corporate officer failed to discharge her duties and that her failures were overlooked for nearly five years does not constitute reasonable cause. It does demonstrate a lack of internal controls and managerial oversight.

Further, even if petitioner was able to show that the Internal Revenue Service abated penalties, it would not be determinative herein. The Tax Appeals Tribunal has stated:

"Although the IRS abated penalties assessed upon petitioner, we have to determine whether, based on the New York State Tax Law and its accompanying regulations, petitioner established reasonable cause. As stated above, petitioner has not introduced any evidence to show that its actions were reasonable based upon the circumstances. With respect to petitioner's good tax compliance history, although we do give weight to such a factor, petitioner's good tax compliance history alone is not determinative (Matter of McDonnell Douglas Corp., Tax Appeals Tribunal, May 4, 1989). Accordingly, based on the facts presented in this case, we conclude that petitioner failed to sustain its burden in demonstrating reasonable cause pursuant to Tax Law § 1085(a)(1) and (2). Therefore, the notices of deficiency are sustained." (Ross Viking Merchandise Corp., Tax Appeals Tribunal, August 8, 1991.)

Therefore, the Division's denial of petitioner's request for refund of penalties on corporation tax for the years 1986, 1987 and 1988 is sustained.

PERSONAL INCOME AND SALES AND USE TAXES

B. Petitioner raises the same arguments for reasonable cause in the personal income tax (withholding taxes) and sales and use tax matters, i.e., the corporation had no knowledge that its vice president and secretary was not filing returns and paying the tax due. However, Mr. Stewart did not explain how it could be that he, as president of the corporation did not have reason to believe something was amiss for almost five years. Mr. Stewart claims that he did not realize there were filing and payment problems until January 9, 1990.

However, in the petition filed in the income tax matter he acknowledged that Mrs. Stewart failed to pay their mortgage, failed to pay the Internal Revenue Service and even "bounced checks". Mr. Stewart contends that he was unaware of these events because his wife would not grant him access to her office.

Petitioner is a very small corporation with only two officers who happen to have been husband and wife. Personal problems between officers which detrimentally affect the corporation cannot be construed to constitute reasonable cause within the meaning and intent of Tax Law §§ 1145(a)(1)(iii) and 685(a)(1)(A). Further, such marital problems are not within the more specific definitions and examples found in the regulations at 20 NYCRR 536.5(c)(1)-(5) (sales tax) and 20 NYCRR 107.6(d)(1)-(4) (income tax).

Given the failure to demonstrate reasonable cause, the penalties assessed are sustained for both the income and sales and use tax matters.

C. The Division raised the issue of whether the Division of Tax Appeals has jurisdiction to hear a matter where the assessments set forth tax, penalty and interest due on a "Notice and Demand" rather than a "Notice of Determination and Demand". Specifically, in this matter, sales tax penalties were assessed on a "Notice and Demand".

The propriety of making assessment via a notice and demand has been upheld in circumstances such as those presented here. In Matter of MGK Constructors (Tax Appeals Tribunal, March 5, 1992), the Tribunal held as follows:

"The first issue is whether the issuance of a notice and demand for payment is sufficient to assess penalties and interest due. Tax Law § 1138 states that a notice of determination shall be issued: where no return has been filed, where the return filed is incorrect or insufficient, or where the tax commission believes that the collection of an assessment may be jeopardized by delay (Tax Law § 1138[a][1] and [b]). The Court of Appeals has held that these are the only instances where a notice of determination is appropriate (Matter of Parsons v. State Tax Commn., 34 NY2d 190, 356 NYS2d 593; see also, Matter of Hall v. State Tax Commn., 108 AD2d 488, 489 NYS2d 787). Since our facts involve the late filing of a correct return, a circumstance not covered by Tax Law § 1138(a)(1), a notice of determination would not have been appropriate. Therefore, the issuance of a notice and demand for payment was proper in this situation" (see also, 20 NYCRR 535.2[d]).

It is also clear that taxpayers have a right to petition for a hearing or to request a

conciliation conference with respect to a sales tax notice and demand. More specifically, the right to a hearing upon timely request therefor, as provided under Tax Law § 2006.4, as well as the accompanying alternative right to a conciliation conference upon timely request therefor, as provided under Tax Law § 170(3-a), is not provided for, modified or denied with respect to a notice and demand by any other provision of law. Therefore, petitioners were entitled to challenge the subject notices and demands through either a petition for hearing or a request for conciliation conference. In fact, this conclusion is borne out clearly by the Tribunal's issuance of a decision on the merits of the penalty assessment itself in MGK Constructors (supra).

D. The Division also raised an issue regarding the Division of Tax Appeals' authority to hear the income tax matter presented in DTA #810716, with regard to penalties assessed pursuant to Tax Law § 685(a). The Division cited the Matter of Dreisinger (Tax Appeals Tribunal, July 20, 1989) in support of its contention that the Division of Tax Appeals does not have such jurisdiction.

However, Dreisinger held that the Division of Tax Appeals had no jurisdiction where 685(a) penalty was assessed by means of a "Notice and Demand" not a "Notice of Deficiency" which was the assessment document issued herein. Therefore, Dreisinger is not on point and the Division of Tax Appeals has jurisdiction to hear and decide this matter, since the notice of deficiency confers specific hearing rights on petitioner.

E. The petitions of T & T Excavation & Paving Corp. are denied and (a) the denial of refund of corporation tax penalty, dated March 20, 1992 is sustained; (b) the six notices of deficiency dated January 14, 1991 are sustained; and (c) the nineteen notices and demands issued February 11, 1991 and the one Notice and Demand for Payment of Sales and Use Taxes Due dated September 5, 1991 are sustained.

DATED: Troy, New York
October 28, 1993

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE